77-916

IN THE SUPREME COURT OF THE

UNITED STATES

Fall Term 1977

JO ANN WILLIAMS

Petitioner

and

CLARENCE WEBB

Petitioner

-vs-

UNITED STATES OF AMERICA

Respondent

Petition for Writ of
Certiorari to the
United States Court of
Appeals for the
Sixth Circuit

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PETITION

The petitioners, Jo Ann Williams and Clarence Webb, respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered December 6, 1977.

OPINIONS BELOW

A) Sixth Circuit Court of Appeals. The order of the Court, to be unreported is reproduced at Appendix, p. . The court ruled that the District Court did not err in denying the Petitioners' Motion to Suppress Evidence. This order was entered of record December 6, 1977.

B) The United States District Court, Northern District of Ohio, Western Division. The memorandum and order of Judge Walinski, an unreported opinion, is reproduced at Appendix, p. . This order denied the

Petitioners' Motion to Suppress Evidence. It was entered of record December 20, 1976.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). The order of the Court of Appeals was entered of record December 6, 1977.

QUESTIONS PRESENTED FOR REVIEW

(1) Whether surreptitious surveillance of a private room by a government agent is, in fact, a search of a constitutionally protected area.

(2) Whether this warrantless surveillance conducted in the absence of exigent circumstances constitutes an unlawful search.

(3) Whether the initial illegality of the surveillance denies the government the right to use or act upon anything heard.

(4) Whether the ensuing search is unlawful when a law enforcement officer conducts a

limited search for weapons without reasonable grounds to believe his safety is in danger.

CONSTITUTIONAL PROVISIONS INVOLVED

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

> "The right of the people to be secure . . . against unreasonable searches and seizures shall not be violated . . ."

STATEMENT OF THE CASE

A) Procedure

The Petitioners were arrested in Toledo, Ohio, on June 19, 1976, and charged with possession of heroin and cocaine in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Prior to trial, Petitioners filed jointly a Motion to Suppress Evidence. This Motion was denied December 20, 1976.

The Petitioners then entered pleas of guilty as charged to two counts of the indictment involving 21 U.S.C. 841(a)(1).

The trial court allowed the Petitioners to expressly reserve a right to appeal from the order of the District Court.

The Petitioners were sentenced on May 6, 1977. Notice of Appeal to the Sixth Circuit Court of Appeals was filed on May 16, 1977. Upon consideration of the joint brief by the Petitioners and a hearing on the matter, the Court of Appeals affirmed the ruling of the District Court.

The basis for federal jurisdiction in the District Court was a federal indictment returned on August 25, 1976, against the Petitioners. The constitutional objections and federal questions raised in this Petition were expressly discussed in the Petitioners' Motion to Suppress Evidence.

B) The Facts

On June 18, 1976, Defendants, Jo Ann Williams and Clarence Webb, driving a 1976 Lincoln Continental automobile, bearing

Ohio license plates, arrived at the Toledo Airport, just outside Toledo, Ohio, parked their vehicle near the Airport Motel. Defendant Williams entered the motel at approximately 6:00 p.m. and registered using a Detroit, Michigan, address.

Preliminary Inquiries by Airport Security

At approximately five minutes past six (6) o'clock in the evening on this same date, Lieutenant Velliquette, airport security patrol, was notified by an airport maintenance man that an automobile matching the description of that driven by Defendants had entered on the airport grounds, driving in an "erratic" manner.

Officer Velliquette, after receiving this information concerning erratic driving, left his station and proceeded to the Airport Motel where he arrived within several minutes after being contacted. Officer Velliquette testified that he went

to the motel to discuss the driving violation with the vehicle operator. Officer Velliquette saw the 1976 Lincoln Continental automobile parked near the motel, and, after taking down the license plate numbers, began looking for the occupants of the vehicle. Officer Velliquette questioned several workmen who were working outside the motel, and was told that the occupants of the vehicle had entered into the motel. Officer Velliquette entered into the motel and was informed by the desk clerk that a Black Male and Black Female had just registered and were assigned to room 115. Officer Velliquette testified that after this initial investigation, that his suspicions became aroused. According to Officer Velliquette, the basis for his suspicions were: (1) a non-local license plate number when the occupants had registered with a Detroit, Michigan, address

*(Appendix, p. 57); (2) the suspicious "eyeballing" by Defendant Webb of Velliquette when the latter was questioning the room clerk *(Appendix, p. 58); (3) the Defendant Webb's peering out of his motel window as he was driving away. *(Appendix, p. 58). The combination of these incidents led Officer Velliquette to believe that he should contact Paul Markonni, a special agent of the Federal Drug Enforcement Administration, United States Department of Justice, who was coincidentally present at the Toledo Airport at this time, and advise Officer Markonni that something was "suspicious."

Initial Involvement of the Federal Agent

Agent Markonni was at the airport to familiarize himself with peak traffic periods and the physical layout of the airport. Upon his arrival, he had identified himself to airport security and

* Refers to Joint Appendix filed with Brief submitted to Sixth Circuit Court of Appeals

had asked to be informed of anything unusual. *(Appendix, p. 101.) At approximately 6:10 p.m. that day, Officer Velliquette personally informed Agent Markonni that something was suspicious at the motel. Both officers then went to the motel where Markonni was introduced to the room clerk. *(Appendix, p. 106.) Officer Markonni again verified the registration of Defendants Williams and Webb and made further inquiries as to their activities since their arrival at the Airport Motel. Agent Markonni secured the following information: (1) that Williams had registered and had given a Detroit address; and (2) that two telephone calls had been placed from room 115 by Defendants to a number in Los Angeles, California. *(Appendix, p. 107.) Agent Markonni, at this time, told the clerk to advise him of any future telephone calls made to or from room 115.

Surveillance of the Defendants

Agent Markonni, while continuing his surveillance of room 115, contacted the Toledo Police Department and requested a license number check on the 1976 Lincoln Continental. *(Appendix, p. 104.) In addition, Agent Markonni contacted, by telephone, law enforcement officers in Los Angeles, California, and requested that they verify the listing and address of the telephone number which had been called from Defendants' room. At this time, Agent Markonni also registered as a guest specifically requesting and receiving the room adjoining that occupied by Defendants. Agent Markonni was assigned to room 114.

From approximately 9:30 p.m. on June 18, 1976, until approximately 2:15 a.m. the morning of June 19, 1976, Officer Markonni maintained intensive surveillance of room 115 from the adjoining room, 114. During this span of time, Officer Markonni

made several telephone calls, but did not make any attempt to obtain an arrest warrant for the occupants of room 115. He was also advised by telephone that the Los Angeles phone number called by the Defendants was unlisted and that Detroit authorities did not find a Jo Ann Williams at the address she had registered. *(Appendix, p.115.)

Conversation Overheard by Agent Markonni

At approximately 2:15 a.m., the morning of June 19, 1976, Officer Markonni was advised by the desk clerk that a yellow and white colored automobile, bearing Ohio license plates and occupied by three male blacks, had arrived outside the motel.

Officer Markonni was also advised that one of the occupants, an unidentified male black, had exited the automobile, entered the motel, and walked towards room 115. Officer Markonni testified that he then put his ear to the door connecting

with room 115 and overheard the following conversation:

"What have you got?"

"Fifteen of boy and some of girl, if you want."

"Let's get out of here." *(Appendix, p. 79.)

Within moments after hearing the above quoted conversation, according to Officer Markonni, the Defendants, accompanied by the unidentified male black, exited the motel and entered the motel parking area where the Defendants, along with the unidentified male black, entered into the 1976 Lincoln Continental automobile. At this point in the sequence of events, according to Officer Markonni, the 1976 Lincoln Continental automobile and the yellow and white automobile, occupied by two unidentified male blacks, left the airport grounds and headed east on Airport Highway.

Observing from his motel window that

the two automobiles were leaving the airport, Officer Markonni followed. *(Appendix, p. 82.) Officer Markonni followed these two vehicles from the time they left the airport grounds at 2:15 a.m., until 3:00 a.m., when both vehicles pulled into a parking lot near Todedo in a business district. After making unexplained stops in two parking lots, the vehicles stopped in a third parking lot. *(Appendix, p. 83.) Agent Markonni then observed the unknown person in the Lincoln Continental leave that vehicle, walk to the Mercury, and return to the Continental. This sequence was repeated once again and the vehicles drove away simultaneously.

The Arrest and Search of the Defendants

Offcier Markonni followed the vehicles east on Dorr Street until they turned onto Detroit Avenue. At that time, he intercepted a police cruiser and requested assistance in stopping these vehicles.

*(Appendix, p. 89.) With the aid of local police, Officer Markonni stopped the Defendants' vehicle on the entrance ramp to Interstate 475. The yellow and white Mercury vanished, never being located or identified prior to these proceedings.

Officer Markonni approached the driver's side of the 1976 Lincoln Continental and ordered Defendant Webb out of the vehicle. Defendant Webb complied. *(Appendix, p. 89.) When Defendant Williams was ordered out of the vehicle, she continued sitting in the front seat. Officer Markonni asked her to hand out her pocketbook, but she remained silent. *(Appendix, p. 90.) At this point, Officer Markonni grabbed the handbag and reached inside, finding heroin and cocaine. Officer Markonni's stated purpose in entering the handbag was "To protect myself in terms of weapons." *(Appendix, p. 90.) Both

Defendants were then arrested and charged as per the indictment.

REASONS FOR THE WRIT

Petitioners respectfully submit that the order of the District Court and the affirmance by the Court of Appeals are in conflict with the decision of this Court in Katz v. United States, 389 U.S. 347 (1967).

(1) Surreptitious surveillance of a Private room by a government agent is, in fact, a search of a constitutionally protected area.

The fact that Agent Markonni did conduct an intensive surveillance on the Defendants while they were occupying room 115 is undisputed and it is also undisputed that this surveillance was at least, in part, conducted by eavesdropping on the Defendants' conversation from his adjoining motel room. The conduct of the

arresting agent is prohibited by the Fourth Amendment.

The rationale of Katz v. United States, 389 U.S. 347, 19 L. Ed.2d 576, 88 S.Ct. 507 (1967) establishes the right of privacy upon which these Defendants justifiably relied. The following language of Justice Stewart, cited hundreds of times, is again applicable:

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection, but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

Justice Harlan, in a concurring opinion, further qualified this protective language. For suppression of overheard speech, the speaker must have justifiably relied upon his privacy. This requires (1) an actual and reasonable expectation on the part of the individual and (2) an

expectancy that society is prepared to recognize as reasonable. Courts, in applying the Katz doctrine, have uniformly applied both a subjective and an objective test in evaluating the right of privacy. United States v. Holmes, 521 F.2d 859 (5th Cir. 1975); United States v. Kim, 415 F. Supp 1252 (U.S. Dist. Ct., D. Hawaii 1976).

The facts surrounding the Katz decision and the facts herein are closely in parallel. In the former, F.B.I. agents attached an electronic recording device outside of a public telephone booth from which Katz placed calls. In the latter, Agent Markonni, without the aid of any electronic device, eavesdropped by ear on the conversations of those then occupying the adjoining room. In both cases, arrest was made after the search.

The Katz decision is also authority in classifying this surveillance as a search:

> "The Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements that are overheard without any technical trespass under local law: the reach of the Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."

For constitutional purposes, a motel room is no less a private place than a telephone booth. Hoffa v. United States, 385 U.S. 293, 17 L.Ed.2d 374, 87 S. Ct. 408 (1966); Stoner v. California, 376 U.S. 483, 11 L.Ed.2d 856, 84 S. Ct. 889 (1964). Neither is it of constitutional importance that the words of the Defendants here were not physically seized by way of recording. The capacity to claim the protection of the Fourth Amendment against unreasonable searches and seizures depends not upon

a property right, but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. Mancusi v. DeForte, 392 U.S. 364, 20 L.Ed.2d 1154, 88 S. Ct. 2120 (1968). An examination or taking of physical property is not required. Silverman v. United States, 365 U.S. 505, 5 L.Ed.2d 734, 81 S. Ct. 679 (1960).

That the Defendants were subjected to a search by surveillance is amply supported by authority. A search by definition is a prying into hidden places for that which is concealed. The Defendants herein manifested at all times a concern and a desire to conceal and protect their activities. The telephone calls to Los Angeles and the conversations overheard by Agent Markonni transpired within the confines of a supposedly private room and, but for official governmental intrusion, these

private actions would have remained private. Only by displaying police authority was Agent Markonni able to gain access to the following:

(1) cooperation from the room clerk by informing him of calls placed to and from room 115; and

(2) assignment to the adjoining room, 114, where he placed his ear to the door and overheard an alleged offer to sell narcotics.

These activities by Agent Markonni constituted an intrusion into a motel room in which the Defendants had a subjective and reasonable expectation of privacy. At the expense of violating this privacy, governmental actions were made with the specific intent of discovering evidence of a crime. A search by definition involves an invasion of privacy, while a seizure involves the taking of property. United States v. Lisk, 522 F.2d 228 (7th Cir. 1975). The search

begins with the initial invasion of privacy and continues until the fruits or evidence of a crime are seized. Consequently, the prohibitions of the Fourth Amendment apply to a search whenever the government participates in such an invasion of privacy. United States v. Davis, 482 F.2d 893 (9th Cir. 1973).

The activities of Agent Markonni constituted a purposeful invasion of the Defendants' reasonable expectation of privacy, and this, by definition, is a search.

The mandate of Katz in this situation is that the Fourth Amendment protects people and not places. The issue before this court is whether the tactics employed by Agent Markonni are to be approved and validated at the expense of individual privacy. Defendants submit that the expectation of privacy they enjoyed in this

motel room was much more than an unrealistic personal expectation. This is obvious when one considers the lengths Agent Markonni went to in order to conduct this surveillance. His actions went far beyond routine police investigation. They included checking the motel registration, verifying the address given in Detroit, checking the vehicle registration, making inquiries as to the telephone numbers called, asking the room clerk to inform him of any activity by the Defendants, and finally, conducted surveillance from the adjoining room. Only by getting his ear as close to the connecting door as he could, was Agent Markonni able to overhear the critical conversation in room 115.*(Appendix, p.79.) Then as quietly as he could, Agent Markonni looked out into the hallway to observe the Defendants leave the motel.

The great lengths that Agent Markonni went to in order to keep these Defendants under surveillance suggest a manifest invasion of privacy. All of these actions were taken without probable cause to arrest or to search. The choice before this court is to legitimate covert surveillance by police, lacking any reasonable grounds to search, or to apply the protection of Katz with full force. To legitimate these tactics is to negate the protection of Katz whenever persons occupy a motel room. This is contrary to the spirit and purpose of Katz and the Fourth Amendment to the United States Constitution which is supposed to guarantee freedom from unreasonable governmental searches and seizures and a right to personal privacy.

(2) Warrantless surveillance conducted in the absence of exigent circumstances constitutes an unlawful search.

When Agent Markonni caused the motel room clerk to register him in the room adjoining that of the Defendants, he possessed the following information:

(1) The Defendants' vehicle bore Ohio license plates while they had registered using a Detroit, Michigan address. *(Appendix, p.107.)

(2) The room clerk could not recall seeing any luggage. *(Appendix, p. 107.)

(3) The Defendants' vehicle had been reported to have entered the airport grounds driving the wrong way. *(Appendix, p.103.)

(4) Upon arrival, the Defendants had placed a telephone call to an unlisted number in Los Angeles, California *(Appendix, p. 107) and completed this call later. *(Appendix, p. 109.)

(5) The Defendant Webb had looked at Officer Velliquette in a "suspicious

manner" on two occasions. *(Appendix, p. 104.)

(6) The Defendants had received one telephone call from Los Angeles, California. *(Appendix, p. 109.)

Armed with this information, Agent Markonni began intensive surveillance of room 115. This surveillance continued from 6:25 p.m., June 18, through 3:10 a.m. on June 19, 1976. Throughout this extensive time period, Officer Markonni had access to a telephone with which to verify certain information received; however, he made no attempt to obtain a search warrant or to obtain an arrest warrant for the occupants of room 115.

The facts known by Agent Markonni at the time he conducted this search did not amount to probable cause to search. Had there been sufficient facts for probable cause, a warrant

would still have been required. Searches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause. Agnello v. United States, 269 U.S. 20, 70 L.Ed. 145, 46 S. Ct. 4 (1925). Searches conducted without a warrant are per se unreasonable, absent well-defined exigencies. Chapman v. United States, 365 U.S. 610 (1960) and Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280 (1925).

In view of the hours over which this surveillance was conducted, no exigencies were present. Had the agent applied for a search warrant, none could have lawfully been issued given the known facts.

In similar situations, surveillance of this nature has been held unlawful. In State v. Person, 34 Ohio Misc. 97, 298 N.E.2d 922 (1973), the court found that eavesdropping at a door to a private room from a common passageway and looking

through a key hole constituted a search within the meaning of the Fourth Amendment. Surveillance became a search when it violated the Defendant's reasonable expectation of privacy. It was held to be unlawful since no warrant was issued and since eavesdropping, even from a lawfully occupied vantage point, does not fall within the plain view exception to the warrant requirement. This reasoning of a Toledo, Ohio, court is distinctly relevant here.

Also applicable are a series of decisions from California courts. The leading case in California being People v. Triggs, 106 Cal. Rptr. 408, 506 P.2d 232 (1973). In Triggs, surveillance of two men occupying a stall in a public men's room was held to be a search. It was found further to be an unreasonable search since the surreptitious activity

was done with the intention to find evidence of guilt and begun without reasonable cause to search the Defendant. The testimony of Agent Markonni leaves no doubt that the principle of Triggs is applicable here:

> Q: When you took the room, your purpose was to eavesdrop on room 115, is that correct?
>
> A: My purpose was to conduct surveillance of the room while I was in there and, also, to use the phone in there. . .
>
> Q: In addition, you would listen through to any conversation you could hear?
>
> A: Yes.
>
> Q: You did so?
>
> A: Yes, I did, but I didn't do it then. *(Appendix, p. 112.)

To conduct surveillance upon activities of a private motel room without reasonable cause to do so is constitutionally impermissible activity.

The result reached in People v. Triggs, (supra) is now being applied in other jurisdictions. In People v. Diaz, 85 Misc. 2d 41, 376 N.Y.S.2d 849 (1975), visual surveillance of Defendants from an opening at the top of a department store dressing room was held to be an unlawful search. In People v. Harfmann, 555 P.2d 187 (1976) a Colorado Court of Appeals held a visual observation that infringed upon a reasonable expectation of privacy constituting an unlawful search. Under basically the same facts as in Triggs, the same result was reached in Kroehler v. Scott, 391 F. Supp. 1114 (E.D. Penn. 1975). The District Court found that persons using toilet stalls in public restrooms have reasonable expectations of privacy, both subjectively and objectively reasonable. Further, the Fourth Amendment requires a

probable cause finding by a magistrate before governmental intrusion is lawful.

The Defendants in this case, beyond dispute, had a subjective expectation of privacy while residing at the motel. Recent decisions cited herein have established both a subjective and reasonable expectation of privacy in analogous situations. These situations are legally indistinguishable from the facts herein.

In the visual surveillance cases cited above and in the present case, the searches were conducted lacking probable cause to search. To accept these searches would indeed dispense with the need for a magistrate's finding of probable cause. Therefore, on this basis, the lack of probable cause to search, Defendant's counsel would distinguish United States v. Fisch, 474 F.2d 1071 (9th Cir. 1973) and United States v. Llanes, 398 F.2d

880 (2nd. Cir. 1968.)

In Fisch, the court specifically recognized the fact that there was reasonable cause for the police to believe that the room in question was being used in the aid of a criminal venture. This was also the case in Llanes where officers actually viewed white powder being placed in glassine envelopes. However, in the present case, the agent's basis for the surveillance was mere suspicion.

(3) The initial illegality of the surveillance denies the government the right to use or act upon anything heard.

The end cannot justify the means herein, and the surveillance cannot be justified by what the subsequent arrest produced. Given the initial illegality, evidence seized is fruit of the poisonous tree and must be suppressed. Wong Sun v. United States, 371 U.S. 471, 83

S. Ct. 407, 9 L.Ed.2d 441 (1963); Chapman v. United States, 365 U.S. 610, 81 S. Ct. 776, 5 L.Ed.2d 828 (1961).

What a court must determine is whether the looking and listening carried on was an intrusion upon what the Defendants reasonably sought to preserve as private. See Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968).

Appellants submit that the decisions in Johnson v. United States, 338 U.S. 10 (1948) and in McDonald v. United States, 335 U.S. 451, 69 S. Ct. 191, 93 L.Ed. 153 (1948) should be likewise reached in this case.

This court should be guided by the following language from Johnson v. United States, 338 U.S. at 14:

> "The right of officers to thrust themselves into a home is also of grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must

> reasonably yield to search is, as a rule, to be decided by a judicial officer, not by a policeman or a governmental agency."

(4) When a law enforcement officer conducts a limited search for weapons without reasonable grounds to believe his safety is in danger, this search is unlawful.

Agent Markonni testified at the evidentiary hearing concerning the arrest of Defendant Williams. *(Appendix, p. 90.) Upon approaching the Defendants' vehicle, he ordered Defendant Williams out of the car, but she did not comply. As she remained in the vehicle, Agent Markonni got inside. Defendant Williams then refused to turn over her handbag as requested by Agent Markonni. At this time, he seized the purse and opened it, finding the majority of narcotics that are the basis of these charges. *(Appendix, p. 90.) Agent Markonni's stated

purpose in searching the purse was "To protect myself in terms of weapons." *(Appendix, p. 90.) This purpose was confirmed by him on cross-examination, again stating his intent was self-protective search. *(Appendix, p. 130.)

Given the facts known to Agent Markonni at the time he entered the vehicle, a self-protective search was not lawful. The sole justification of an officer's search of a person for self-protection is discovery of weapons to prevent harm to himself and others. The reasonableness of the action depends upon specific, articulable grounds to believe a protective search is necessary. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968).

The key issue, as stated in Terry v. Ohio, (supra), is whether a reasonably prudent person in those circumstances would be warranted in believing his safety

was in danger. Most importantly, in justifying the search, the police officer must be able to point to specific and articulable facts which reasonably warrant the intrusion.

The search of Defendant Williams' purse cannot be justified as a protective search. Agent Markonni had no reason to believe his safety was in danger. This is especially true when the search of the purse was conducted after it had been taken from Defendant Williams. Even had there been weapons inside the purse, any danger to Markonni was removed when he took the purse from Williams.

Having been carried out as a protective search, Officer Markonni's actions cannot later be termed a search incident to arrest. The purpose of an arresting officer then becomes the purpose to search. When an officer does not believe

an arrest has been made, there can be no search incident to an arrest. United States v. Dalpiaz, 494 F.2d 374 (Ky. 1974). A required element of an arrest is the intent of the officer to make the arrest. State v. Terry, 34 Ohio Ops.2d 237, 214 N.E.2d 114 (1966). When Officer Markonni stopped the Defendants' vehicle and ordered them to exit, he did not do so with purpose to arrest.

Since the intrusion into Defendant Williams' purse was not justified initially, all evidence seized as a result of that intrusion is fruit of the poisonous tree and must be suppressed. People v. Hurst, 325 F.2d 891 (9th Cir. 1963).

CONCLUSION

The Petitioners respectfully request that a Writ of Certiorari be issued

to the Court of Appeals for the Sixth Circuit, in order to review the issues raised in this Petition.

Respectfully Submitted,

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Nos. 77-5191 and -5192

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, :
Plaintiff-Appellee :
vs No. 77-5191 :
CLARENCE WEBB, :
Defendant-Appellant :

UNITED STATES OF AMERICA, :
Plaintiff-Appellee :
vs No. 77-5192 :
JO ANN WILLIAMS, :
Defendant-Appellant :

O R D E R

Before WEICK, PECK and ENGEL, Circuit Judges.

The defendants were charged in a two count indictment with possession of narcotics with intent to distribute heroin and cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 2.

The District Court denied a motion filed by the defendants to suppress evidence.

The defendants then entered pleas of guilty and were sentenced, but they expressly reserved their right to appeal from the order of the District Court denying their motion to suppress evidence. We disapproved of this practice in United States v. Cox, 464 F.2d 937 (6th Cir. 1972). When the defendants enter a plea of guilty to an indictment they waive all non-jurisdic-

tional defects.

Nevertheless, in this case we have examined the evidence taken on the motion to suppress and in our opinion the District Court did not err in the denial of said motion.

The judgment of conviction is therefore AFFIRMED.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

By Grace Keller
Grace Keller, Chief Deputy

b

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, -vs- CLARENCE WEBB, et al., Defendants.	)	No. CR 76-72 MEMORANDUM and ORDER

* * *

WALINSKI, J:

This cause came to be heard on defendants' motion to suppress certain evidence seized by law enforcement officers on June 19, 1976, from the purse of defendant Williams and from the automobile in which defendants Williams and Webb were traveling. An evidentiary hearing on this motion was held on November 18, 1976.

I.

Defendants seek to suppress certain quantities of heroin and cocaine found and seized by law enforcement officers during the course of a warrantless search. The events preceding the search are critical to the motion and require elaboration.

The evidence adduced at the suppression hearing established that defendants Webb and Williams checked into the Airport Motel at the Toledo Express Airport, Toledo, Ohio, at approximately 6:00 p.m. on June 18, 1976. The couple's presence was brought to the attention of Special Agent Paul Markonni of the Drug Enforcement Administration by an airport security officer who had become mildly suspicious of the couple.

c

Through inquiries to the motel desk clerk and other law enforcement agencies, Agent Markonni secured the following information regarding the couple:

> 1) The couple had arrived in a green 1976 Lincoln Continental bearing non-local Ohio plates. A check of the plates indicated that they were newly issued and the owner therefore could not be immediately determined.
>
> 2) Although the auto bore Ohio plates, the registering party, Jo Anne Williams, gave a Detroit, Michigan address.
>
> 3) The desk clerk could not recall seeing either defendant bring luggage into the room.
>
> 4) Two phone calls had been placed by the defendants to a number in Los Angeles, California.[1] One phone call had been received by the couple with the caller initially requesting to speak to "Clink" and then asking for the party in Room 115, the room in which the defendants were registered.

This information caused Agent Markonni to suspect that the defendants might be involved in drug trafficking, and he therefore took a room next to the room in which the defendants were registered in order to conduct further surveillance. He then made additional phone calls in which he learned that the phone number in Los Angeles which the defendants had been calling was unlisted, and that Detroit authorities could find no one by the name of Jo Anne Williams listed at the address she had given.

At approximately 2:00 a.m. on June 19, 1976, Agent Markonni was awoken by the motel desk clerk and informed

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[1] Agent Markonni testified that the defendants' attempts to contact persons in Los Angeles were significant to him because of his knowledge that Los Angeles is presently the major distribution center for heroin and cocaine coming into the United States.

that several persons had arrived at the motel in a car and that one individual had gone to the room occupied by the defendants. Agent Markonni testified that he then put his ear to the door connecting his room with the room of the defendants and, without the aid of any electronic listening devices, overheard the following conversation:

> Male One: "What have you got?"
>
> Male Two: "Fifteen of boy and some of girl, if you want."
>
> Male One: "Let's get out of here."

Agent Markonni testified that through his experience as a drug enforcement agent, he knew that in street drug parlance "boy" means heroin and "girl" means cocaine. Therefore, having overheard this conversation he had reason to believe that a drug transaction was about to take place. He further testified that since the occupants of the next room left immediately, he had no time to place a phone call for the purpose of securing assistance or seeking arrest or search warrants prior to following the defendants and their companion.

Agent Markonni testified that having observed the defendants and their visitor enter the 1976 green on green Lincoln Continental and pull away from the motel followed by a yellow on yellow Montego, he then entered his own car and followed. After traveling a number of blocks and after making two unexplained stops in parking lots without any movement by the occupants of either car, Agent Markonni observed the vehicles stop in a lighted parking lot in the area of Dorr and Secor. Agent Markonni then observed the person riding in the

passenger seat of the Lincoln leave the Lincoln and go to the Montego, return to the Lincoln, go back to the Montego, return to the Lincoln and then enter the Montego.

Both cars then pulled out of the lot and with Agent Markonni following, proceeded east on Dorr Street and then turned north onto Detroit Avenue. At that point Agent Markonni was able to flag down a Toledo Police Department vehicle, and with the assistance of the officers manning that vehicle, stopped the Lincoln Continental shortly after the vehicle moved onto Interstate 475 via the ramp at Detroit Avenue.

Agent Markonni testified that he promptly ordered the defendants out of the vehicle. When defendant Williams did not move from the vehicle, Agent Markonni entered and observed Williams reach for her purse which was on the floor beneath her legs. At that time Agent Markonni grabbed the purse from her, and upon opening it, found several packets of narcotics. A subsequent search of the vehicle revealed an additional packet of heroin in the seat where defendant Webb was seated.

II.

The warrantless search of an automobile is justified in only two instances. The search must either be incident to a lawful arrest, in which case the scope of the search must be contemporaneous with the arrest and limited to the "area within the immediate control" of the person arrested,[2]

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[2] See Chimel v. California, 395 U.S. 752 (1969); United States v. Robinson, 414 U.S. 218, 224 (1973); United States v. Hayes, 518 F.2d 675 (6th Cir. 1975).

or there must exist both probable cause to believe that the automobile contains evidence or the fruits of a crime and exigent circumstances making it impracticable to secure a search warrant.[3]

In determining whether the warrantless search and seizure of narcotics in the instant case is supported by either of these exceptions to the general rule against warrantless searches, the Court's initial inquiry is directed to the legality of Agent Markonni's "intrusion" into the conversation of the defendants conducted within the confines of their motel room. While the defendants take the position that with or without access to the motel conversation quoted above there was insufficient probable cause to justify a warrantless arrest and search, it is the Court's view that if the conversation of the defendants was properly within the knowledge of Agent Markonni, probable cause did exist to arrest the defendants and to conduct a warrantless search. Therefore, the critical question in deciding defendants'

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[3] See Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925); United States v. Beck, 511 F.2d 997 (6th Cir. 1975); United States v. Kemper, 503 F.2d 327 (6th Cir.), cert. denied, 419 U.S. 1124 (1975).

Probable cause exists where "the facts and circumstances within [the officers'] knowledge and of which they have reasonably trustworthy information [are] sufficient within themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." United States v. Uptheqrove, 504 F.2d 682, 686 (6th Cir. 1974), quoting Carroll v. United States, 267 U.S. 132, 162 (1925). The basic test for whether exigent circumstances exist is whether "it is not practicable to secure a warrant." United States v. Blanton, 520 F.2d 907, 912 (6th Cir. 1975), quoting Carroll v. United States, 267 U.S. 132, 153 (1925).

motion is whether the information obtained by Agent Markonni, by placing his ear to the door of the defendants' motel room, was secured in violation of their Fourth Amendment rights to be free from unreasonable search and seizure.

III.

Under the rule of United States v. Katz, 389 U.S. 347 (1967), this question turns on whether the defendants enjoyed an expectation of privacy with respect to their conversations within the motel room they occupied, and whether that expectation was "one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361. The latter question is not one which may be decided as a matter of law, bur rather requires an examination of the facts and circumstances of the particular case. While it is persons and not places that are protected by the Fourth Amendment, the environment of the defendants is clearly critical in determining whether or not they entertained a reasonable expectation of privacy. See United States.v. Fisch, 474 F.2d 1071 (9th Cir. 1973), aff'g United States v. Perry, 339 F. Supp. 209 (S.D. Cal. 1972).

The Court would not dispute the defendants' characterization of a motel room, even though transiently occupied, as a private place. See Hoffa v. United States, 385 U.S. 293 (1966); Stoner v. California, 376 U.S. 483 (1964). That is not to say, however, that persons occupying a motel room enjoy a reasonable expectation of privacy as to all conduct or conversations carried on therein. The conversations of the defendants and their guest in the instant case

were audible to the naked ear in the adjoining room. Agent Markonni clearly had a right to occupy that room, and the defendants certainly are charged with the knowledge that such an adjoining room existed, and that it was not unlikely that the adjoining room would be occupied.

Defendants would make much of the fact that Agent Markonni "deliberately" attempted to overhear their conversations by putting his ear to the door connecting the two rooms. However, the Court finds nothing constitutionally objectionable in this mode of surveillance in the circumstances of the instant case. Contrast United States v. Case, 435 F. 2d 766 (7th Cir. 1970). Although the conduct of the defendants prior to the point at which Agent Markonni was able to overhear the critical conversation may not have constituted sufficient probable cause to arrest the defendants, it clearly provided Agent Markonni with reason to put the defendants under surveillance. To bar mere eavesdropping as conducted by Agent Markonni under the circumstances of the instant case would unduly hinder the legitimate efforts of law enforcement officers in the investigation of serious criminal activity.

Accordingly, the Court concludes that while the defendants may well have entertained an actual and subjective expectation of privacy, that expectation, under the facts and circumstances of the instant case, is not "one that society is prepared to recognize as reasonable." 389 U.S. at 361. There was, therefore, no justifiable reliance by the defendants, and therefore the eavesdropping by Agent Markonni did not constitute a search and seizure in violation of the Fourth

Amendment. Accord United States v. Sin Nagh Fong, 490 F.2d 527 (9th Cir. 1974); United States v. Perry, 339 F. Supp. 209 (S.D. Cal. 1972), aff'd sub nom. United States v. Fisch, 474 F.2d 1071 (9th Cir. 1973). See also United States v. Martin, 509 F.2d 1211 (9th Cir. 1975).

V.

Having resolved the initial search and seizure question in favor of the government, the Court concludes that the facts and circumstances known to Agent Markonni at approximately 2:30 p.m. on the morning of June 19, 1976, were sufficient to warrant a man of reasonable caution to believe that a serious offense had been committed by the defendants, and that the car in which they were riding contained evidence or fruits of a crime. The Court further finds that exigent circumstances existed which made it impracticable to secure a search warrant.[4] Therefore, it is the opinion of the Court that the warrantless search in the instant case is supportable both as a search incident to a lawful arrest[5] under the rule of Chimel v. California, 395 U.S. 752 (1969), or alternately, as a search based on the existence of probable cause and exigent circumstances under the rule of Chambers v. Maroney, 399 U.S. 42 (1970).[6] Accordingly, defendants' motion to suppress will be denied.

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

Toledo, Ohio.

December 17, 1976.

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[4] See United States v. Blanton, 520 F.2d 907 (6th Cir. 1975); United States v. Upthegrove, 504 F.2d 682 (6th Cir. 1974).

[5] Although the defendants were not technically placed under arrest until after the narcotics had been seized from defendant Williams' purse, for the purpose of determining whether the search was incident to a lawful arrest, the defendants were "arrested" at the time Agent Markonni forced them from the car and made it clear that they were not free to leave. See Henry v. United States, 361 U.S. 98, 103 (1959); McDonald v. State of Arkansas, 501 F.2d 385 (8th Cir. 1974); United States ex rel. Frazier v. Henderson, 464 F.2d 260 (2d Cir. 1972). Moreover, since the Court has found that probable cause to arrest the defendants did exist at the time Agent Markonni stopped their vehicle, it is not significant that the vehicle was searched prior to formally completing the arrest. (Footnote 5 continued on following page.)

(Continuation of Footnote 5.) See United States v. Jenkins, 496 F.2d 57 (2d Cir. 1974), cert. denied, 420 U.S. 925 (1975); United States v. Murray, 492 F.2d 178 (9th Cir. 1973); United States v. Skinner, 412 F.2d 98 (8th Cir.), cert. denied, 396 U.S. 967 (1969). United States v. Shkoza, 406 F. Supp. 1065 (S.D. N.Y. 1975).

[6] See United States v. Birmley, 529 F.2d 103 (6th Cir. 1976); United States v. Williams, 526 F.2d 1000 (6th Cir. 1975); United States v. Martin, 509 F.2d 1211 (1975); and cases cited in n. 4, supra.